



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELC CASE NO. 3 OF 2012**

KARUARA M'LAIRENGE.....PLAINTIFF

VERSUS

M'LAIRENGE M'AIRUTI.....DEFENDANT

**RULING**

The advocate for the plaintiff during a mention for this suit on 21.5.2013, urged the court to look at the pleadings and note that the defendant was over 90 years old and the plaintiff was over 80 years old. He submitted that this suit hinges on the evidence of the two parties, who, he claimed were ailing. He, therefore, made 2 oral applications:

1. **THAT this suit be exempted from the requirements of order II of the Civil Procedure Rules, 2010, in accordance with Order II rule 1.**
2. **THAT the plaintiff and defendant whose evidence was pivotal in the determination of this suit have their evidence heard urgently as they were of advanced age.**

The defendant's advocate opposed the 2 applications. He argued that the 2 applications had substantial ramifications and, therefore, the orders as sought by the plaintiff could not be entertained during a mention session. Regarding compliance with order 11 of CPR, 2010, he said his side supported compliance to obviate the possibility of ambush by any party at the hearing stage. Concerning the hearing of the plaintiff's and defendant's evidence, as prayed, he submitted that the plaintiff should file a formal application.

The advocate for the plaintiff countered that his applications were mere procedural matters and that the applications would benefit both parties in that the suit would be heard and determined expeditiously. He also stated that the defendant had not demonstrated how he would be prejudiced if the applications were allowed.

I have considered the submissions of both parties regarding exemption of the suit from the requirements of Order 11 of the CPR, 2010. I would not have found it difficult had both parties expressed their consent. Indeed the applicant has not given me any reasons why I should be persuaded to exempt this suit from compliance.

As for taking the evidence of the plaintiff and defendant urgently to pre-empt its being lost in the event that they cease to live before the suit is heard and determined, I have the following to say.

1. **De bene esse evidence is conditional, provisional and in anticipation of a future need. In certain cases, courts will embrace that evidence be taken outside the orthodox route to**

**prevent its being lost through the demise of a party or prolonged absence of a party.**

- 2. In Kenya, De bene esse evidence is embraced by Order 18, Rule 9 (1) which states: “where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after institution of the suit, take the evidence of such witness in the manner herein before provided.”**

In my view, for a party to show “other sufficient cause to the satisfaction of the Court”, it is necessary that all parties be heard. The best way of facilitating the hearing of parties fully, is through the filing of a formal applicant. In any case, Order 51 of the CPR, lays down the procedure to be followed in such matters.

In the circumstances, I dismiss the two oral application with no order as to costs.

**WRITTEN AND SIGNED AT MERU THIS 22ND DAY OF MAY, 2013.**

**P. M. NJOROGE**

**JUDGE.**

**Delivered and Signed in Open Court at Meru this 30th day of May, 2013, in the presence of:**

**P. M. NJOROGE**

**JUDGE**